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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 141

VIRGINIA VANDENBARK,

Petitioner,

vs.

THE OWENS-ILLINOIS GLASS COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF.

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REPLY BRIEF.

Petitioner's original brief in support of petition for writ of certiorari has been treated as a brief on the merits and this reply brief is directed to the brief of respondent in opposition to the petition for writ of certiorari and to the brief in support thereof.

Application of State and Federal Law.

The age old rule of law that for every wrong there is a remedy, has been completely ignored by respondent in its brief. Each of the cases cited by respondent were decided before *Erie Railroad* v. *Tompkins,* and none of the cases are tort cases.

Defendant hopes to confuse the issue, evade liability for admitted tortious infliction of disability, in this instance occupational disease.

The corporate respondent would evade the liability of Ohio G. C. 871-15, 871-16, 6330-1 and 1027 (Appendix, pages 35 to 37, original brief).

Defendant would also evade the common law duty of the employer to warn and instruct an employee of dangerous conditions existent in its employment.

This respondent would evade the clear liability of whichever way it turns:

(A) The Federal "general" common law as applied prior to the *Erie Railroad* v. *Tompkins* decision, 304 U. S. 64, 58 Sup. Ct. 817, 114 A. L. R. 1493 (applying when this case was filed on March 29, 1937), with absolute liability in a case like the one at bar is shown by the cases of: *Jacque* v. *Locke Insulator Corp.*, 70 F. (2d) 680, cert. denied 293 U. S. 585; *Zajowski* v. *American Steel and Wire Company*, 258 Fed. 9, 6 A. L. R. 348; *Michalek* v. *U. S. Gypsum Company*, 298 U. S. 639, citing: *Schmidt* v. *M. D. T. Company*, 270 N. Y. 287, 200 N. E. 824.

(B) Now, the absolute law of Ohio as decided by the Ohio Supreme Court in the case of *Triff, Admrx.* v. *National Bronze and Aluminum Foundry Company*, and *Smith* v. *Lau*, 135 O. S. 191, 20 N. E. 2nd, 232, 121 A. L. R. 1131.

Defendant-Respondent completely ignores the language of the above Ohio case to-wit (page 13 of original brief):

> "At the time workmen's compensation was first adopted in Ohio an action for occupational disease or for wrongful death therefrom could be maintained against the employer guilty of actionable negligence. There has never been a statutory or constitutional provision expressly denying the right to maintain an action growing out of a non-compensable occupational disease."

If, as the respondent argues, and petitioner denies, respondent had a right not to be sued in a direct suit at law,

on the authority of *Mabley and Carew Company* v. *Lee*, 129 O. S. 69, 193 N. E. 745, and *Zajachuck* v. *Willard Storage Battery Company*, 106 O. S. 538, 140 N. E. 405, it is now abundantly clear in the *Triff, Admrx.* v. *National Bronze and Aluminum Foundry Company* case that that claimed right by respondent has been *taken away*, vacated, and clears the way for effectual relief to this petitioner, by reversal of the lower courts. This, it is urged, is the clear logic in *Gulf, Colorado and Santa Fe Railroad Company* v. *Dennis*, 56 L. Ed. 861, 224 U. S. 503.

And, so too, did the United States Circuit Court of Appeals ignore this language, and apparently confused this petitioner's case with the new statutory law on occupational diseases in Ohio, which law has no application in this case and gives this petitioner no remedy whatsoever as it applies solely to later cases. The law expands the scope of compensation in Ohio for occupational diseases applying after the effective date of the act.

Defendant also ignores the law of *Erie Railroad* v. *Tompkins*, 58 Supreme Court at 822:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or *by its highest Court in a decision* is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general", be they commercial law or a part of the *law of torts*. * * *" (italics ours).

Defendant Corporation is also willing to ignore the fact that to deny liability to this Petitioner would not be equal protection of the law, but would be denying recovery to a non-resident of Ohio whereas a resident of Ohio has the

right to recovery. This is pointed out in the original brief at page 18 in that Smith in the associated case with the *Triff, Admrx.* v. *National Bronze,* filed his petition January 15, 1935, in the State courts, and the petitioner herein filed her case on March 29, 1937, in the Federal Court. Smith is now in the process of attempting recovery.

Defendant fails to point out what, if anything more this petitioner could or should have done to protect her rights. It is urged that she has done everything possible to protect her rights.

Defendant-respondent further urges that Ohio employers are not fairly treated from the economic point of view and that havoc will strike Ohio industry. The law and economics are concisely and clearly stated showing no such unfairness, along with the history of the State laws and decisions in the case of *Jones* v. *Rinehard and Dennis Company,* 113 W. Va. 414, 168 S. E. 482, decided only a short time prior to the *Triff* case in Ohio.

Defendant urges that *Swift* v. *Tyson,* even before rejected by this Court had no application in the case at bar. We do not believe this to be the case but believe that the Federal common law did apply, *Jacque* v. *Locke Insulator Corp.,* 70 F. (2d) 680, cert. denied 293 U. S. 585. However, we submit that it makes no difference whether the case did or did not apply in the ultimate outcome of this case because, if (1) the Federal general common law applied there was a right to recovery and the decision of the United States Circuit Court and of the United States District Court are in error. (2) Or, if the law of Ohio is to apply as pronounced in the latest decision of the court, *Triff* v. *National Bronze,* the court has clearly stated and held (exact language page 13 original brief) that there never was a bar to such a common law action, and that the right to bring such action *has always existed in Ohio,* then too the lower courts were in error and must be reversed.

Defendant urges that petitioner has reversed her stand on what law applies to the case. It is true that when the case was filed in the District Court that it was believed the Federal common law applied and gave plaintiff a right to sue and that in the United States Circuit Court of Appeals with the shift of law both by this Court and the Ohio Supreme Court it was then believed that the latest pronouncement of the Supreme Court of Ohio applied in conformity with the *Erie Railroad* v. *Tompkins, Carpenter* v. *Wabash Rwy.*, 60 Sup. Ct. 416, and *Gulf, Colorado and Santa Fe Rwy.* v. *Dennis*, 56 L. Ed. 861, 224 U. S. 503. By that time the Supreme Court of Ohio had specifically held that there had always been the right to sue under Ohio Law. Regardless of the field of law applied it is urged that the changing, living law is not to be interpreted so as to deny petitioner a proper remedy.

Errors specified in the specification of errors are sufficiently broad in their scope to permit this Court to readily apply the proper law to the case at bar.

Defendant urges, and the Circuit Court stated, that it was conceded that when the District Court dismissed plaintiff's petition it correctly applied the State Law. In argument before the United States Circuit Court the language of the *Triff* case stating that there had always been a right to sue was called to the court's attention, and it was there urged that on the State law the decision of the District Court was wrong. This may have been misconstrued or the full significance missed by the court, which seems to be the case inasmuch as the Circuit Court refers to the language of the statute (new Occupational Disease Statute passed after the *Triff* case was decided) as not being retroactive, with no reference to this all important language of the *Triff* case.

Each of the cases cited by defendant in its brief was, we believe, cited by the United States Circuit Court and each

of said cases has been analyzed in our original brief, pages 22 to 27, in their application to the case at bar. *Not a single one of the cases cited was a tort case where no remedy was available for admitted* wrongs imposing disability. It is believed that the cases are overruled by this Court in *Erie Railroad* v. *Tompkins,* in so far as they might be construed as to deny recovery here by petitioner.

Defendant has nowhere answered the questions of law raised in the petitioner's original brief in *Gulf, Colorado and Santa Fe Railroad Company* v. *Dennis,* 56 L. Ed. 861, 224 U. S. 503, where this Court held that so long as a case is still pending, that the right to an attorney fee was still sub-judice; that the reasons were quite as strong, to say the least, for applying the rule of giving effect *to a change of law and fact* arising since the judgment of a lower court bearing upon the right disposition of the case, to a writ of error *to a State court,* as to writ of error to a Circuit Court of the United States, in *which the jurisdiction of this Court extends to the whole case.*

This Court has, therefore, held that where there has been a change of law there is just as impelling a reason to correct a decision on appeal in the Federal courts as from a State court, where the appeal is solely on a Federal question.

Neither is the logic of the case of *Crozier* v. *Fried, Krupp, Aktiengesellschaft,* 56 L. Ed. 771, 224 U. S. 290 (original brief page 21), even attacked by defendant. Justice was done in that patent case, this Court granting claimant the application of later law, and not *denying him all right* of recovery because of a change of law.

And, so too, in the case of *Watts, Watts & Co., Ltd.,* v. *Unione Austriaca, etc.* (page 21, original brief), 248 U. S. 21, 39 S. Ct. 1, 63 L. Ed. 100, 3 A. L. R. 323, the case was disposed of, "as justice may at this time require."

The Columbia Law Review, Vol. XL, November, 1940, No. 7—page 1251, carries a review of the Circuit Court's

decision, and agrees with the contention of this petitioner that the majority decision of the Circuit Court was incorrect and concludes, pages 1254-1255:

"But the underlying philosophy of the Judiciary Act as construed in Erie *v.* Tompkins is that diversity of citizenship shall not cause discrimination in result according to whether enforcement was sought in federal or in state courts. This principle applies with even greater force to matters of local law, such as the construction of the state constitution involved in the instant case, than to matters of general law controlled by Erie *v.* Tompkins. The problem of discrimination by diversity of citizenship is accentuated by the possibility that the exceptions regarding intervening decisions, until now applied only to the narrower concept of the Judiciary Act involving local law, may be expanded, as the scope of the Judiciary Act has been expanded by Erie *v.* Tompkins, to situations involving decisions of general law. As, however, the precedents establishing these exceptions have not the strength of unanimity, it is submitted that they be reconsidered in terms of the philosophy of Erie *v.* Tompkins.

That case declares that 'the law to be applied in any case is the law of the State' and that no 'supervision over' or 'interference with' the states will be tolerated, regarding matters of state law. Thus insofar as the present decision and the exceptions on which it was based refuse to apply the latest expression of the state law, they are inconsistent with the spirit to be derived from this language. IF THE LAW OF THE STATE IS THE LAW AS IT WOULD BE APPLIED UPON APPEAL IN THE STATE COURTS, THE JUDGMENT IN THE INSTANT CASE IS INCORRECT IN DENYING PLAINTIFF RECOVERY."

Quoting Note #16 from above—page 1254:

"Some of the decisions holding that a federal court must follow a change in the line of state decisions made pending appeal from a lower federal court are: Gulf, Colo. & S. F. Ry. *v.* Dennis, 224 U. S. 503 (1912);

Groner *v.* United States *ex rel.* Snower, 73 F. (2d) 126 (C. C. A. 8th, 1934); St. Louis & S. F. Ry. *v.* Quinette, 251 Fed. 773 (C. C. A. 8th, 1918); Sanford *v.* Poe, 69 Fed. 546 (C. C. A. 6th, 1895); see Wichita Royalty Co. *v.* City Nat. Bank, 306 U. S. 103, 107 (1939); American Sugar Refining Co. *v.* New Orleans, 119 Fed. 691 (C. C. A. 5th, 1902). To the effect that federal courts will follow a later state decision, though contrary to prior rulings made by federal courts, Green *v.* Lessee of Neal, 6 Pet. 291 (U. S. 1832); Jackson *v.* Harris, 43 F. (2d) 513 (C. C. A. 10th, 1930); see Franklin Sugar Refining Co. *v.* Mullen Co., 7 F. (2d) 470, 471 (D. Del., 1925); United States *v.* Schooner Peggy, 1 Cranch 103, 110 (U. S., 1801)."

Defendant has not even attempted to state any impelling rule, reason or logic, why the fundamental rules of justice, fairness, equity and a remedy for every wrong, should not be here applied.

Counsel for petitioner urged that there is no good reason why the judgment of the lower courts should not be corrected and the case be remanded for trial, the only possible remedy for claimant, the petitioner in this cause.

Constitutional Questions.

These questions cannot be brushed aside as easily as respondent would like to make believe. The *Triff* case (*supra*) has clearly held that in Ohio there always was a common law right to sue for non-compensable occupational disease negligently inflicted. To deny this petitioner all remedy whatsoever, as the lower courts have done, does take away her statutory and common law right to sue without the placing of anything whatsoever in the place thereof and it is urged does actually contravene her rights under the 14th Amendment to the United States Constitution. Nothing whatsoever has been placed in the stead of her common law remedy. *There is no other remedy whatsoever, except this action at law.*

The Constitutional Questions are seriously urged if, (1) the State and Federal cases are applied so as to deny petitioner a remedy; (2) if the Ohio cases of *Mabley and Carew* v. *Lee*, 129 O. S. 69, 193 N. E. 745; and *Zajachuck* v. *Willard Storage Battery Company*, 106 O. S. 538, 140 N. E. 405, are applied so as to hold Article II, Section 35, Ohio Constitution, and/or General Code, 1465-70, as denying petitioner a remedy, (3) and any other holding whereby petitioner is denied a remedy.

Should a denial be permissible, then there can hardly be any impelling reason why any remedy whatsoever need be granted in any case, be it occupational disease or injury. The State could abolish all rights of action, without setting up something adequate in their stead. This was the question outlined but undecided in *New York Central* v. *White*, 243 U. S. 188, at 201, and we believe has never been clearly decided by this Court.

It is respectfuly submitted that the decision of the United States Circuit Court should be reversed and this cause remanded to the United States District Court for further proceedings according to law.

Respectfully submitted,

VIRGINIA VANDENBARK,
By PAUL D. SMITH AND
THOMAS H. SUTHERLAND,
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